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In The

Supreme Court of the United States

October Term, 1998

JOSEPH ORLANDI, DEBORAH A. ORLANDI SIGNORELLI, KAREN ORLANDI PATERNO, MICHAEL E. ORLANDI and JOSEPH ORLANDI,

Petitioners,

v.

CHARLES MILLER, Commissioner of West Virginia Division of Highways and the West Virginia Turnpike Commissioner,

Respondent.

On Petition For Writ Of Certiorari To The West Virginia Supreme Court

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the West Virginia Supreme Court erred in refusing Petitioners' appeal of a lower court decision holding that their real property suffered no compensable taking or damage, in violation of the Fifth Amendment of the United States Constitution.

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STATEMENT OF THE CASE

PROCEEDINGS AND NATURE OF THE RULINGS IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

On May 19, 1984, Petitioners filed in the Circuit Court of Kanawha County, West Virginia a writ of mandamus to require the Appellees to institute eminent domain proceedings for the alleged taking of a 15 foot right of way that they claimed was an appurtenance to approximately 1,126 acres of mineral interests that they owned between Lens Creek and Fields Creek, Louden District, Kanawha County, West Virginia. The Circuit Court of Kanawha denied the writ. Petitioners appealed.

On November 23, 1994, the West Virginia Supreme Court remanded the case to the Kanawha County Circuit Court (Petition, Appendix C), directing the lower Court, after affording the parties a reasonable opportunity to be heard, to construe a 1956 deed from the Bradford Estate to the West Virginia Turnpike Commission and to determine whether this deed did, in fact, extinguish or transfer away the Bradford Estate's (15 foot) easement reserved in a 1936 deed. After making such construction, the Circuit Court was to rule whether the July 12, 1977 deed language purporting to transfer to Joseph Orlandi actually did transfer the easement reserved and excepted in the 1936 deed.

Upon remand, by Order entered March 20, 1998, the Kanawha County Circuit Court ruled " . . . that the petitioners' petition for writ of mandamus and request for setting this matter on the Court's docket for condemnation proceedings, on remand from the Supreme Court

of Appeals of West Virginia is hereby DENIED" (Petition, Appendix B).

On July 20, 1998 Petitioners again petitioned for appeal to the West Virginia Supreme Court, which denied the petition by Order entered September 24, 1998 (Petition, Appendix A). From this Order Petitioners herein appeal.

STATEMENT OF THE CASE AND THE FACTS

Petitioners seek a Writ of Mandamus requiring the Department of Transportation, Division of Highways to institute a proceeding in eminent domain to acquire their claimed interest in a 15 foot right of way reserved in favor of the Petitioners' predecessor in title in that certain deed from George S. Laidley, Administrator, to the Bedford Land Company, dated September 8, 1936, and recorded in the Office of the Clerk of the County Commission of Kanawha County, West Virginia, in Deed Book 420, at page 301.

HISTORY OF THE 15 FOOT RIGHT OF WAY

The 15 foot right of way was created in that certain deed, dated September 8, 1936, from George S. Laidley, Administrator, to Bedford Land Company, which deed is recorded in the aforesaid Clerk's office in Deed Book 420, at Page 301, wherein there was reserved a 15 foot right of way in the following language:

> Eighteenth: The grantors herein hereby reserve for the benefit of themselves, their heirs, devisees, grantees and assigns, a right of way fifteen (15) feet in width for a private road over and across the land hereby conveyed from Kanawha River to the land now owned by the grantors herein, lying back or south of the land hereby conveyed, as an appurtenance to said back land, the location of said fifteen foot right of way to be hereafter designated and fixed by the grantee herein, it's successors and assigns, which shall have the right to use said fifteen foot road in common with the grantors herein, their heirs, successors, devisees, grantees and assigns, including the right to cross and recross the same, but not in such manner as to impair, restrict or interfere with the full and free use thereof by the said grantors herein, their heirs, devisees, grantees, successors and assigns, and so as to afford a crossing over the Chesapeake & Ohio Railway.

This right of way next appeared in a deed dated April 7, 1951, between Bradford B. Laidley, Trustee, to Carl E. Peal and Dorothy Peal, husband and wife, recorded in the aforesaid Clerk's Office in Deed Book 954, at page 312. In this instrument the Grantor conveyed to the Grantees the 15 foot right of way in the exact same language as above set forth. This deed conveyed the surface only to the Grantees, reserving all oil, gas, coal and other minerals to the Grantor. The deed contained eight tracts of land which comprised some 1,126 acres, more or less.

The third appearance of the 15 foot right of way is in a deed, dated July 12, 1977, from Kanawha Valley Bank,

Successor Trustee, to Joseph Orlandi, predecessor in title to the present owners, and of record in the aforesaid Clerk's Office in Deed Book 1835, at Page 211. The right of way was conveyed in the following language:

> Together with appurtenances appertaining to the coal and the right to mine coal in and under the aforesaid eight tracts of land . . . ; including but not limited to, a right of ingress and egress in common with the party of the first part, its successors and assigns, from the hill land to the Kanawha River on that certain right of way reserved in the aforesaid deed from George S. Laidley, Administrator, with the will annexed of the estate of William A. Bradford, Jr., dated September 8, 1936 and of record in the Clerk's office in Deed Book 420, page 301.

In this deed the Grantor conveyed "all of its right title and interest in and to the coal and the right to mine coal". The deed contained eight tracts comprising 1,126 acres, more or less.

Intervening the deed from Bradford B. Laidley, Trustee, to Carl E. Peal and Dorothy Peal and the deed from Kanawha Valley Bank, Trustee, to Joseph Orlandi is the controlling deed to this issue. Bradley B. Laidley, Trustee, et al., conveyed 18.419 acres of coal, oil, gas, and other minerals to the West Virginia Turnpike Commission, by that certain deed dated April 6, 1956, and recorded in the aforesaid Clerk's office in Deed Book 1174, at page 111.

On page three of the aforesaid deed there are specific reservations and exceptions.

Page five of the said deed contains the following language of conveyance and release:

> Although it is recognized that the party of the second part may use, sell or otherwise dispose of all or any portion of the land hereby conveyed as if its intended use were not mentioned herein, it is understood by the parties of the first part that the said parcel of real estate is presently intended for use in connection with the construction, maintenance, operation and/or use of a non-access Turnpike, in furtherance of which, the parties of the first part, whether the owner of other remaining or other land adjoining said Turnpike, or of any interest therein or not, do hereby grant, convey, release and forgo unto the said party of the second part unless heretofore expressly reserved or excepted, all easements of way over, across, along, through, upon or under the lands hereby conveyed and all rights and easements of access to or egress from said lands and hereby releases the party of the second part, its successors and assigns, from any and all claims for damages or compensation of any nature whatsoever arising either directly or indirectly from the construction maintenance operation and use of the said Turnpike.

The West Virginia Supreme Court, in its November 23, 1994 decision, directed the Circuit Court of Kanawha County to construe this language.

SUMMARY OF THE ARGUMENT

In the 1956 deed the West Virginia Turnpike Commission expressly bought a controlled-access interest for the expansion of the West Virginia Turnpike for the purpose of upgrading the Turnpike to Interstate standards.

The grantor in the deed used the following language in its release and conveyance to the West Virginia Turnpike Commission of a controlled access interest:

> . . . in furtherance of which, the parties of the first part, whether the owner of other remaining or other land adjoining said Turnpike, or of any interest therein or not, do hereby grant, convey, release and forgo unto the said party of the second part unless heretofore expressly reserved or excepted, all easements of way over, across, along, through, upon or under the lands hereby conveyed and all rights and easements of access to or egress from said lands and hereby releases the party of the second part, its successors and assigns, from any and all claims for damages or compensation of any nature, whatsoever arising either directly or indirectly from the construction maintenance operation and use of the said Turnpike.

What was owned by the Laidley Trust in 1956 was the right to designate the location of a 15 foot right of way. The location of the right of way upon the ground was never established. This right to designate the location of the right of way was released by the language of release and conveyance contained in the deed between Kanawha Valley Bank, Trustee, to the West Virginia Turnpike Commission, as set forth above.

The phrase "unless expressly reserved or excepted" clearly refers to the present instrument. The deed began with a conveyance of the coal, oil, gas, and minerals to the Grantee, followed by expressed reservations and exceptions, and then by the language of release above set forth.

The West Virginia Supreme Court directed the Circuit Court of Kanawha County to construe the language of the deed and then determine if any interest in realty owned by the Petitioners was taken or damaged by the construction in the expansion of the West Virginia Turnpike.

That is exactly what the Circuit Court of Kanawha County did in its Order of March 20, 1998. Kanawha Valley Bank, Trustee, did not own the 15 foot right of way that it purported to convey to Orlandi. Thus, Orlandi acquired no title to the 15 foot right of way.

REASONS FOR DENYING THE WRIT

Petitioners' argument may be fairly summarized as follows:

1) that they owned a right of way through a reinforced concrete box culvert that was taken when the box culvert was replaced by a smaller drainage pipe when the West Virginia Turnpike was widened to four lanes; 2) that even if they did not own an easement through the box culvert, they owned other property interests that were damaged, though not taken, when vehicular access to the area was relocated; and, 3) that the Circuit Court of Kanawha County, West Virginia and the West Virginia Supreme

Court failed to apply the proper analysis by failing to recognize that Petitioners were entitled to compensation for damage to their property even if no property was taken. Because no property interest was taken, no showing was made of probable compensable damage to Petitioners' property, and because the Courts below correctly applied the law, the instant Petition should be denied.

Petitioners had no property interest that was directly taken. The Circuit Court on remand was directed to construe the 1956 deed from the Bradford Estate trustee to the Turnpike Commission to determine whether that deed extinguished or transferred away the Bradford Estate's 15′ easement reserved in the 1936 deed to the Bedford Land Company. The West Virginia Supreme Court, in its September 27, 1994 unpublished per curiam opinion, expressly observed that the pertinent language of the 1956 deed to the Turnpike Commission granting and conveying all rights and easements over and through the property conveyed – "unless heretofore expressly reserved or excepted" – was somewhat ambiguous and that it should be construed on remand (Petitioner's Appendix C, p. 23). This the Circuit Court did, stating in its opinion that "said language clearly indicates that such a reservation or exception would be indicated *in this deed*, but was not because the parties intended that a complete transfer of the property be completed so as to further the construction of the closed access Turnpike, as was indicated in the language of the deed" (Petitioner's Appendix B, p. 7. Emphasis added by Respondent). That Court had before it all maps and deeds introduced in the record, and also had the benefit of expert testimony concerning title

to the properties in question, as well as testimony from petitioner Joseph Orlandi.

Petitioners appear to rely more heavily on their argument that even if they cannot not show clear title to an easement running through the box culvert, they are entitled to compensation because the access to at least some of their various coal and surface properties in that area is not as direct and convenient as it was before the box culvert was replaced. "[A]ll that is needed to be established", they argue, "is that they had a property interest that the widening of the turnpike damaged or resulted in probable damage and that Petitioners can show a good faith argument for damages" (Petition, p. 18). To support this claim of damage, they offered the testimony of Petitioner Joseph Orlandi that using Clark Road, the public road that continues to access his property, to get to the river would be "about three miles longer" than a direct access from the closest part of his property through the box culvert to the river (Petition, Appendix F, p. 53). This lengthened access would, according to Mr. Orlandi, increase the cost of coal hauled by truck to the river by "about fifty cents" per ton (Petition, Appendix F, p. 54).

The Kanawha County Circuit Court, on remand, considered both the taking issue surrounding the 15′ easement and the issue of damage, concluding "that the petitioners have not been damaged by the actions of respondents and that a mandamus action should not lie against the respondents to proceed with condemnation hearings on this matter" (Petition, Appendix B, p. 8). This ruling is both consistent with the facts and applies the proper law.

> One who seeks relief by mandamus must show a clear legal right to the relief which he seeks. A landowner who seeks by mandamus to compel the state road commission, or state road commissioner, to institute proceedings in eminent domain to determine just compensation for land which he alleges has been taken or damaged for state highways purposes must establish that the highway construction has resulted in probable damage to his property *of such nature that compensation therefore may be properly ascertained in an Eminent Domain proceeding.*

(emphasis added). Syllabus by the Court No. 4, *State ex rel. Woods v. State Road Commission*, 148 W.Va. 555, 136 S.E.2d 314 (1964). West Virginia Courts, in considering what damages to property are compensable in eminent domain, have stated that "[n]ot every damage to real estate is compensable. It is common knowledge that in the relocation of our highways property of many persons is left in situations less advantageous to the owners." *Gardner v. Bailey*, 128 W.Va. 331, 36 S.E.2d 215, 218 (1945). See also *Heavener v. State Road Commission*, 118 W.Va. 630, 191 S.E. 574 (1937).

Like other landowners in the area, the Petitioners still have access to their property along relocated County Route 61/2, a public road in the state road system.

> The Constitution [W.Va. Const. Art. 3, § 9] does not undertake to guarantee to a property owner the public maintenance of the most convenient access to his door. The law will not permit him to be cut off from the public thoroughfares, but he must content himself with such direct route for outlet as the regularly constituted public

> authority may deem most compatible with the public welfare.

Richmond v. Hinton, 117 W.Va. 223, 185 S.E. 411, 412 (1936).

Petitioners argue that "it is abundantly clear that all of the lower Court decisions (West Virginia Supreme Court and Kanawha County Circuit Court) did not apply the proper analysis" (Petition, p. 18). However, they cannot plausibly suggest that the lower courts failed to recognize the general principle that compensation can be due for damage to property even where there is no taking, as this principle comprises the sole syllabus point of the West Virginia Supreme Court's November 23, 1994 decision remanding the case to the Circuit Court (Petition, Appendix C, p. 12). Petitioners quote from the case *State ex rel. McCormick v. Miller*, 171 W.Va. 42, 297 S.E.2d 448, (1982), citing *State ex rel. Teter v. State Road Commission*, 152 W.Va. 805, 809, 166 S.E.2d 757, 760 (1969) for the proposition that "[w]here the evidence is conflicting, but there is reason to believe that the construction of a road by the respondents could have caused damage to the petitioners' land, *and the evidence indicates that there was probable damage*, a writ of mandamus will require institution of eminent domain proceedings in order to have the jury determine such issues" (emphasis added by Respondent) *McCormick*, S.E.2d at 450 (Petition, p. 19). The full quotation from the *Teter* opinion, correctly supplied by the *McCormick* Court, begins "In cases of this kind. . . . " *McCormick*, S.E.2d at 450. The *McCormick* Court goes on to explain just what "cases of this kind" are: "The problems and facts in the case before us are analogous to those in *Teter*. The issue is whether the Department of Highways

altered the natural flow of water and whether that diversion damaged the appellants' property" *Id*. In short, both *McCormick* and *Teter* dealt with drainage, an issue playing no part in the instant case.

More significantly, however, even if one applies this principle of law to the instant case, the Kanawha County Circuit Court found that there was no damage to Petitioners' property. Petitioners insist that "[w]hether damages have occurred to the Petitioners is not relevant at this initial stage", (Petition, p. 21) and that "it was improper for the Court to conclude that there were no damages and to not order condemnation based thereon. All that had to be established was probable damage" (Petition, p. 22). Yet the very language cited by Petitioners in the *McCormick* and *Teter* cases suggests it is proper for the Court to consider whether evidence supports probable damages that are compensable in eminent domain, and not merely fanciful, speculative or non-compensable damages. There cannot be probable compensable damages if there are no compensable damages at all.

The Circuit Court of Kanawha County properly construed the 1956 deed, as it was directed to do on remand from the West Virginia Supreme Court, and found that no 15′ easement survived that conveyance that later passed to the Petitioners. It also correctly found that no compensable damage resulted to the Petitioners' lands by virtue of the acts of the Respondents. Accordingly, the decision of the West Virginia Supreme Court denying Petitioners' petition for appeal to that Court was proper.

Moreover, neither court below has "decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals", nor has either "decided an important question of federal law which has not been, but should be, settled by this Court", or "decided an important federal question in a way that conflicts with relevant decisions of this Court". *Rules of the United States Supreme Court*, Rule 10.

CONCLUSION

For the forgoing reasons Respondent, the West Virginia Commissioner of Highways, prays that this Court DENY THE WRIT.

Respectfully submitted,

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APPENDIX – TEXT OF WEST VIRGINIA CONSTITUTIONAL PROVISION INVOLVED

ARTICLE 3, § 9 – PRIVATE PROPERTY, HOW TAKEN:

Private property shall not be taken or damaged for public use, without just compensation; nor shall the same be taken by any company, incorporated for the purpose of internal improvement, until just compensation shall have been paid, or secured to be paid, to the owner; and when private property shall be taken, or damaged, for public use, or for the use of such corporation, the compensation to the owner shall be ascertained in such manner, as may be prescribed by general law; provided that when required by either of the parties, such compensation shall be ascertained by an impartial jury of twelve freeholders.